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Council News

Michigan Council of School Attorneys

President's Letter

Gary A. Chamberlin
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"May you live in interesting times..."

This frequently quoted old Chinese proverb has never been so applicable than in Michigan's current public educational climate, which reflects the volatile state of this state. Consequently, legal counsel who help to guide and advise their public and private school partners are similarly living in "interesting times."

On the one hand, public school districts have never been so budget-strained and concerned about expenses, as sources of revenue slow or reverse course, and total costs (including legal costs) continue to escalate. On the other hand, never before in our state's history have school districts been more in need of timely, efficient and creative advice and counsel from their attorney partners.

The attacks on public education programs in Michigan seem to be relentless. Just recently, for example:

- Despite significant work and coordination by the Michigan Legislature, school districts and industry associations, Michigan placed 21st out of 40 states in the federal Race To The Top program, and didn't qualify for any Phase I funds;
- Michigan lawmakers have begun discussing a possible state aid cutback for public school districts that have fund balances in excess of 15 percent of their total expenditures, thus penalizing boards that have been fiscally responsible in managing their district's finances;
- Due to continued shortfall in Michigan tax revenues, the state's foundation allowance for 2010-2011 may be reduced by $118 — $268 per pupil; and
- Industry experts have speculated that, with the depletion of federal American Recovery and Reinvestment Act (ARRA) "stimulus" funds, school districts will have to severely slash budgets — perhaps resulting in the loss of upwards of 300,000 education jobs nationally by this fall.

The combined pressures of Michigan's budget shortfalls, the need for student achievement results, No Child Left Behind (NCLB) compliance and many other factors, have required legal counsel to advise and guide their school district clients and employers about subjects that haven't been contemplated and undertaken for many years by many public school districts. Unfortunately, some of these trends don't appear to be short-lived:

- Deep financial cutbacks as an annual board of education exercise;
- Greater health care cost sharing by employees;
- Pay "freezes" and reductions;
- Concession bargaining on all fronts;
- Contracting for non-instructional support services; and
- Impasse declaration and implementation of final offers.

While at times the horizon may seem ominous, members of the MCSA and their able talents and skills are now more critical than ever. We've been given an opportunity to enter territory that allows for unprecedented creative thought, research and guidance. Some school districts are being forced to tread into uncharted waters. When they do, those boards and administrators will rely on and value our advice and counsel more than ever. Thus, the current financial crisis will bring even more opportunities to strengthen the relationships with our public education partners. Serve well.

LeadStrong

In This Issue...

A Review of the "Adverse Effect" Doctrine in Michigan Tenure Cases

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Typically, employers don't concern themselves with the conduct of their employees that takes place outside of work. However, more frequently employers are finding that the conduct of employees outside of the workplace may have a negative or adverse effect on the workplace in various ways. In Ohio, an arbitrator upheld the discharge of a high school teacher when nude pictures of him turned up on MySpace by his estranged wife.[1] The arbitrator focused on the negative publicity surrounding the photos including that students discovered the photos, a local newspaper published the Web site, and the pictures appeared on the door of a local pub. In another case out of Washington D.C., a police officer was suspended after inadvertently forwarding a sexually and racially offensive text to his friends, family and co-workers, many of whom where highly offended by the message.[2]

Until recently, Michigan hasn't dealt with teacher conduct that occurred outside of the school, wasn't criminal, and didn't involve students, but had an adverse effect on the other students, teachers and parents at the district. This article reviews the history of the adverse effect doctrine in Michigan and a recent Tenure Commission decision which appears to diverge from the Michigan rule that evidence of adverse effect, while not required, may justify disciplinary action against a teacher for off-duty conduct that doesn't involve students.

History of Adverse Effect Doctrine in Michigan

The adverse effect doctrine in Michigan dates back to the mid '70s in the Court of Appeals decision of *Beebe v. Haslett Public Schools*.[3] In that case the school district sought to discharge a kindergarten teacher for failing to maintain discipline and safety of her class. The Court of Appeals interpreted the Teacher Tenure Act's requirement that teachers may only be discharged or demoted for "reasonable and just cause" as requiring the district to show that the teacher's conduct in question adversely effected the other teachers and students at the school district.[4] The court articulated the requirement to show adverse effect in the following manner:

> Given the presumption of fitness engendered by tenure status, 'just and reasonable cause' can be shown only by significant evidence proving that a teacher is unfit to teach. Because the essential function of a teacher is the imparting of knowledge and of learning ability, the focus of this evidence must be the effect of the questioned activity on the teacher's students. Secondarily, the tenure revocation proceeding must determine how the teacher's activity affects other teachers and school staff.[5]

The court then looked to other jurisdictions for guidance on how to apply the adverse effects doctrine and found that, "Activities outside the classroom have warranted discharge where they brought such notoriety to the teacher that his teaching ability was impaired. Special care must be taken to show this link between out-of-school acts and in-school behavior."[6] Specifically, the court found the California case of *Morrison v. State Board of Education* to be instructive and adopted the California court's analysis.[7] In that case, the California Board of Education revoked Mr. Morrison's teaching license for a single out-of-school homosexual episode between Mr. Morrison and another adult.[8] The incident violated no law and there was no evidence that the plaintiff had engaged in any other such episode, attempted to solicit any of his students or to impress any homosexual preference on his students.[9] The *Morrison* court held that, although 'immorality' was a statutory ground for dis-

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1 *Warren City Board of Education*, 124 LA 532, 532-33 (2008).

2 *Wash. Metro. Area Transit Auth.*, 124 LA 972 (2008).

3 66 Mich. App. 718 (1976), rev'd, in part, 406 Mich. 224 (1979).

4 *Id* at 724 (citing MCL 38.101).

5 *Id*.

6 *Id* at 724-725.

7 1 Cal.3d 214 (1969)

8 *Beebee*, *supra*, at 725.

9 *Id*.

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missal, plaintiff was improperly dismissed.[10] The court held that, before any act could be deemed a ground for discharge, it must bear directly on the teacher's fitness to teach and must cause a clearly discernible detriment to the school and to its students.[11] The *Morrison* court articulated its holding in the following manner:

> We therefore conclude that the board of education cannot abstractly characterize the conduct in this case as 'immoral,' 'unprofessional,' or 'involving moral turpitude' within the meaning of section 13202 of the [California] Education Code unless that conduct indicates that the petitioner is unfit to teach. In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining a teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards.[12]

The Court of Appeals decision was appealed to the Michigan Supreme Court, which reversed in part.[13] The Supreme Court's opinion focused on the manner in which the Court of Appeals framed the Teacher Tenure Commission's decision as resting on the school board's disagreement with Beebee's teaching philosophy. The Supreme Court reframed the issue as "plaintiff's failure to implement her philosophy in a safe and orderly fashion."[14] The court held that there was competent, material and substantial evidence to support the Commission's finding that there was reasonable and just cause to uphold Ms. Beebee's discharge.[15] The court opined that Beebee's classroom was lacking in safety and control.[16] Interestingly, the Supreme Court didn't reference the extensive "adverse effects" analysis articulated by the Court of Appeals and left open the question as to the continued viability of the doctrine.

After the Court of Appeals announced its decision in *Beebee,* but prior to the Supreme Court's reversal of the decision on other grounds, the Court of Appeals again applied the adverse effects doctrine in *Sutherby v. Gobles Board of Education.*[17] In this case, the school's administration brought tenure charges against Mr. Sutherby alleging that his professional services were unsatisfactory and that he should be discharged. The board of educa-

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10 *Id.*

11 *Id.*

12 *Beebee*, *supra*, at 725-726 (quoting *Morrison*, *supra*, at 229-230.) (Footnotes omitted.)

13 *Beebee v. Haslett Public Schools (After Remand)*, 406 Mich. 224 (1979).

14 *Id* at 229.

15 *Id*.

16 *Id* at 230.

17 73 Mich.App. 506 (1977). Mr. Sutherby's discharge was upheld by the Tenure Commission and he sought relief from the Circuit Court in Van Buren County, which affirmed the discharge. Mr. Sutherby made a delayed application for leave to appeal to the Court of Appeals which was denied. On further appeal, the Supreme Court remanded case back to the Court of Appeals for consideration on delayed leave granted. *Sutherby v. Gobles Board of Education*, 401 Mich. 833 (1977).

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tion determined that there was just and reasonable cause to discharge Mr. Sutherby.[18] On remand from the Supreme Court, the Court of Appeals took this opportunity to clarify and distinguish its decision in *Beebee* in the following manner:

> In *Beebee,* supra, the questioned activity could not automatically be presumed to have a detrimental effect on the students; as a matter of fact, defendant school board there admitted that the affected students were no worse in achievement level than the rest. Here, however, the questioned activities and the record concern a consistent pattern of violation of rules and regulations that clearly are within the powers of the school board and the administration. Such a pattern of violation, showing persistent insubordination to proper authority, can be presumed to have an adverse effect on the students, teachers and staff of a school. This record substantiates that presumption. [19]

The court suggested in Sutherby, therefore, that some cases don't require a showing of adverse effect because it's presumed, such as with Mr. Sutherby's persistent insubordinate behavior with authority.[20]

Following the *Sutherby* decision, the adverse effects doctrine was next addressed in *Clark v. Ann Arbor School District,* where a female teacher was accused of having an improper relationship with a male student.[21] The district alleged that Ms. Clark was seen kissing the student in his apartment, stayed the night with the student in his apartment, and was seen leaning up against the student while he was lying on his mattress. Ms. Clark admitted to staying overnight at the student's apartment after her car wouldn't start and that the student gave her a back massage. She also admitted to taking a two-week long road trip to the Western part of the country with this student and another student and that she allowed the student in question to drive her car even though she knew that he didn't have a driver's license and was on probation. The board of education voted to discharge Ms. Clark. On appeal to the Tenure Commission, the Commission determined that it couldn't find sexual misconduct existed between Ms. Clark and the student in question.[22] The Commission did find, however, that Ms. Clark's conduct

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[18] *Id* at 509, fn 1. The board set forth in writing eight specific reasons or findings upon which its conclusion was based:
1. Mr. Sutherby fails to comply with administrative regulations regarding the use of classrooms during the lunch hour in that he permits unsupervised students to use his classroom at that time.
2. Contrary to board policy and administrative rules, Mr. Sutherby often leaves the classroom unsupervised during the time that classes are normally scheduled.
3. Contrary to board policy and the Master Agreement, Mr. Sutherby often failed to turn in lesson plans as required.
4. Contrary to an administrative directive, Mr. Sutherby permitted student use of a storage room.
5. Mr. Sutherby failed to follow procedure prescribed by board policy for dismissing students from class in that students are found absent from his class without hall passes, and are found out of his classroom prior to the dismissal bell.
6. Mr. Sutherby has on many occasions failed to schedule course-related activities for his class, and permits students to engage in non-course-related activities during classtime, such as playing cards, playing chess or working on assignments for other classes.
7. Mr. Sutherby is guilty of violation of professional conduct in that often he finds it necessary to use a loud, shouting voice to control his class.
8. Contrary to board policy and the Master Agreement, Mr. Sutherby failed to call in prior to 7 a.m. on a day that he was to be absent.

[19] *Id* at 512-513. (Internal citations omitted.)

[20] The Court also cited to *Wetsman v. Fraser Public School District*, 62 Mich.App. 104 (1975) for the proposition that tardiness and excessive absenteeism, coupled with evidence of failure to provide daily lesson plans, was sufficient cause for discharge of a tenure teacher without a showing of adverse effect.

[21] 130 Mich.App. 681 (1984).

[22] *Id* at 685.

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displayed a disregard for her special responsibilities as an educator.[23] Her conduct established a serious breach of her duty to her employer and her students, constituting just and reasonable cause for discharge."[24]

Ms. Clark appealed the Tenure Commission's decision to the Circuit Court, which reversed on the grounds that the school district failed to show any adverse effects as required under *Beebee v. Haslett Public Schools.*[25] The Circuit Court Judge Robert Holmes Bell found that *Beebee* required evidence of adverse effect of the teacher's conduct on the students and the school in every case including cases of teacher misconduct.[26] The lower court judge concluded that because the record didn't include any proof that Ms. Clark's actions had a negative impact on the students or other teachers, reversal of the Tenure Commission's decision to discharge was in order.[27]

On appeal to the Court of Appeals, the court held that the Tenure Commission's decision that there was reasonable and just cause for Ms. Clark's discharge was supported by competent, material and substantial evidence and reversed the Circuit Court's decision.[28] With regard to the adverse effect doctrine, the court reaffirmed the *Morrison* analysis that was established in *Beebee.* In addition, the court suggested that in cases involving unprofessional relationships between teachers and students, adverse effect could be presumed.[29] Rather than adopting the broad reading of *Beebee* that was adopted by the Circuit Court, the court refused to apply the doctrine in *Clark.* In creating this distinction, the appellate court again looked to a California decision for guidance. In *Board of Trustees v. Stubblefield,*[30] which was decided after *Morrison,* a deputy sheriff discovered the teacher at night with a student; the teacher's pants were lowered, the student was nude from the waist up with her pants unzipped and open at the waist. In addition, the teacher tried to get away and led the deputy on a high speed chase. The *Stubblefield* court distinguished the *Morrison* decision on the grounds that the potential for misconduct with a student was manifested in this situation[31]:

> The clear import of that [*Morrison*], then, is that a teacher may be discharged or have his certificate revoked on evidence that either his conduct indicates a potential for misconduct with a student or that his conduct while not necessarily indicating such a potential, has gained sufficient notoriety so as to impair his on-campus relationships.
>
> There is no requirement that both the potential and the notoriety be present in each case.

In analyzing the two California cases, the Michigan court looked to the factual differences of the *Morrison* and *Stubblefield* cases, the first dealing with two consenting adults and the second involving a teacher and a student, and noted that the "status" of the parties was important.[32]

In 1986, the Court of Appeals articulated two specific factual circumstances where the adverse effect analysis could be applied in a teacher discipline case and one factual circumstance where it was unnecessary to establish proof of adverse effect. In *Miller v. Grand Haven Board of Education,* four female students in the fifth and sixth

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23 *Id*.

24 *Id*.

25 *Id* at 686.

26 *Id*.

27 *Id*.

28 *Clark*, *supra* at 691.

29 *Id* at 689-691.

30 16 Cal.App.3d 820 (1971).

31 *Clark*, *supra*. at 690 (quoting *Stubblefield, supra,* at 826).

32 Interestingly, Judge Holbrook dissented in the court's *Clark* opinion and agreed with the circuit court judge that the adverse effects doctrine should be applied and would have reinstated Ms. Clark due to the absence of proof indicating that her actions adversely effected teachers or other students.

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grade reported that Mr. Miller, a tenured music teacher, exposed himself to the students.[33] The school board voted four to three to suspend Mr. Miller for the remainder of the school year without pay. On appeal to the Court of Appeals, Mr. Miller argued that the adverse effects doctrine should be broadly applied in all teacher discipline cases. The court explained the applicability of the doctrine in the following manner[34]:

> … we conclude that, while the adverse effect doctrine remains viable in Michigan, it does not have the broad applicability that Miller suggests. Rather than being a requirement that school boards are required to meet in all instances, it is a permissible basis for discipline. That is, a school board may justify a disciplinary action against a teacher by showing that the teacher's conduct or attitude has an adverse effect on the students, staff or institution. Indeed, in some instances the showing of adverse effect may be the only available basis for discipline.

The court suggested two specific factual circumstances where "it may well be appropriate to expect a showing of adverse effect in cases of discipline arising from disputes centering around pedagogical or personal philosophies or courses of conduct."[35] The first scenario is where there's a dispute between a teacher and an administrator over the teacher's teaching style.[36] Second, the court articulated that the adverse effects doctrine applied where a teacher's conduct outside of the school and not involving students, is the basis of discipline.[37] While the court explicitly opined that it didn't require a showing of adverse effect in either of these situations, it speculated that a school board couldn't find reasonable and just cause to discipline a teacher without proof of adverse effect.[38]

The court then provided a third factual circumstance where a showing of adverse effect doesn't have to be pled or shown: where a teacher's conduct occurs on school grounds during work hours, or otherwise involves students.[39] The court cited *Stubblefield* and *Clark* for this ruling and found that Mr. Miller's conduct fell within this third category and that his conduct formed a sufficient basis for the board's disciplinary action against him.[40]

Presumption of Adverse Effect in Cases Involving Criminal Conduct

Several cases have been brought before the Tenure Commission in which a school district sought to discharge a teacher for criminal behavior that occurred outside of school and that didn't involve students.[41] However, many of these cases involve criminal behavior on the part of the teacher. In addressing these cases, the Tenure Commission has adopted the ruling of the Alaska State Court in *Kenai v. Peninsula Borough Board of Education,* which determined that a teacher who had been convicted of a crime involving "moral turpitude raised a presumption that his conduct made him unfit to teach.[42] Applying this presumption in *Satterfield v. Board of Education of the Grand Rapids Public Schools,* the Court of Appeals found that a teacher who pled guilty and was convicted of embezzlement from his second employer was properly discharged from his teaching position.[43] The court upheld that Tenure Commission's finding that Mr. Satterfield failed to rebut the *Kenai* pre-

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33 151 Mich.App.412 (1986).

34 *Id* at 420.

35 *Id*.

36 *Id*.

37 *Id*.

38 *Id* at 421.

39 *Id*.

40 In fact, the court believed that the board would have been justified in discharging Miller. *Id* at 422, fn 16.

41 See *Boyle v. Board of Education of Lapeer County Intermediate School District* (TTC 94-4); *Korda v. Birmingham Public Schools Board of Education* (TTC 94-3), *Belisle v. Flint Community Schools* (TTC 97-24), *Wahl v. Jefferson Schools* (TTC 94-57).

42 691 P2d 1034 (Alaska 1984).

43 219 Mich.App. 435 (1996).

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sumption with evidence that his continued employment would have an insignificant effect upon his students, their parents, his peers, his position as a role model and the reputation of his school. On appeal, Mr. Satterfield argued that by adopting the *Kenai* presumption, the Tenure Commission shifted the burden of proof from the employer to the teacher. The court disagreed and found that the presumption places the burden on a teacher to come forward with evidence to rebut the presumption of unfitness, but the burden of persuasion, which is the burden of proving that there is a reasonable and just cause for termination, remains with the school district.[44] The court also upheld its previous decision in *Miller* that proof of adverse effect isn't a requirement; rather it's a "permissible basis for discipline."[45]

Jobbie Nooner Party + Photos on the Internet = Trouble for One Michigan Math Teacher

One recent controversial case before the Tenure Commission has tested the limits of the adverse effects doctrine and is currently pending before the Michigan Court of Appeals. In October 2008, the Tenure Commission issued its opinion in *Land v. L'Anse Creuse School District.*[46] In this case, Anna Land, a tenured seventh and eighth grade mathematics teacher at L'Anse Creuse since February of 1999, was asked to participate in a joint bachelor/bachlorette party during the summer of 2005 at the "Jobbie Nooner" gathering of boaters on Gull Island in Lake St. Clair, which is approximately 5-10 minutes from the school district and is accessible by boat. While at the party, there were male and female mannequins set up next to one of the boats which dispensed shots of alcohol. The alcohol was poured into tubing at the top of the mannequin and was dispensed through the male and female mannequin's genitalia. While drinking a shot from the male mannequin, Ms. Land was unaware that her picture was being taken. The pictures were subsequently posted on the Jobbie Nooner Web site. These pictures depicted Ms. Land with the thumb and forefinger of her right hand on the mannequin's penis and she appeared to be preparing to put it in her mouth. Another picture depicted Ms. Land with her right hand grasping the mannequin's penis and the penis in her mouth.

In early September 2007, Ms. Land became aware of the photos of her on the Jobbie Nooner Web site through conversations that she had with a colleague and a parent of a student. She notified the middle school principal at her building that there were photos of her taking a shot on the Web site. As a result of the publishing of these photos, the principal received approximately eight phone calls from parents regarding the photos and had conversations with other parents where the subject of Ms. Land's photos was raised. At a board meeting on Sept. 11, 2007, a board member reported to the assistant superintendent for personnel that she had received a call from a parent regarding the photos. Two days later, Ms. Land was placed on administrative leave pending further investigation. At the board hearing regarding the district's tenure charges to discharge Ms. Land, two parents and two students testified before the board regarding their impression of Ms. Land after seeing the photos of her. The parents said that they believed that Ms. Land's behavior was inappropriate and irresponsible and that their children wouldn't be allowed in Ms. Land's class as a result of the photos. The students testified that the topic of Ms. Land's photos was frequently and graphically discussed among the students with the students describing the photos as "oral sex" and a "blow job." The students said that their opinions of Ms. Land have changed for the worse as a result of the photos. An administrator at another middle school in the district testified that individuals at a local Little League meeting were also discussing the photos. Several teachers and parents also testified in support of Ms. Land's effectiveness as a teacher.

The school district brought forth the testimony of an expert on the subject of teacher effectiveness, Kay Cornell, at the tenure hearing. Ms. Cornell explained that the most important factor for teacher effectiveness is the teacher's positive relationship with the students and the respect that the students have for that teacher in the classroom. She opined that middle school aged students are unable to differentiate professional versus personal activity of a

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44 *Id* at 438.

45 *Id* (quoting *Miller*, *supra*, at 420-421).

46 TTC 07-54 (ALJ Ward's opinion issued July 30, 2008).

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teacher and believed that a teacher's effectiveness would be negatively impacted if a student saw the pictures of Ms. Land's simulated fellatio act. Ms. Cornell also speculated that because the photos are sexual in nature, seeing the photos is likely to negatively impact students because they don't view teachers as sexual beings. This would lead the student to be disoriented and confused by Ms. Land's conduct.

In her appeal of the school board's decision to discharge her, Ms. Land argued that her conduct didn't occur on school grounds, didn't involve students, didn't occur while she was on duty and wasn't criminal. She contended that while her conduct may have violated the personal sense of decorum of others, differences of opinion in such matters don't transform her conduct into immoral behavior. The district maintained that her conduct was lewd and unprofessional and in violation of her responsibility to be a role model. The district argued that she adversely impacted the educational process and seriously impaired her ability to be an effective teacher.

In the opinion issued by Administrative Law Judge (ALJ) James Ward, he examined the history of the adverse effects doctrine in Michigan starting with the Court of Appeals decisions in *Beebee v. Haslett Public Schools* through *Miller v. Grand Haven Public Schools.* ALJ Ward applied the eight factors adopted by the Michigan Court of Appeals as set forth in the California court's *Morrison* decision:

1. The likelihood that the conduct may have adversely effected students or fellow teachers;
2. The degree of such adversity anticipated;
3. The proximity or remoteness in time of the conduct;
4. The type of teaching certificate held by the party;
5. The extenuating or aggravating circumstances, if any surrounding the conduct;
6. The praiseworthiness or blameworthiness of the motives resulting in the conduct;
7. The likelihood of the recurrence of the questioned conduct; and
8. The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

ALJ James Ward, determined through his application of the *Morrison* factors that Ms. Land's behavior adversely effected the students as evidenced by the students' changed opinions of Ms. Land. He also considered the parents' testimony in his consideration of adverse effect and the discussion that parents would likely have with other parents regarding the photos of Ms. Land. He believed that the photos would remain a topic of discussion among incoming students and parents for years to come as they were already widely distributed among the students via e-mail. ALJ Ward determined that Ms. Land's conduct was lewd and diminished her effectiveness as a teacher. He concluded that Ms. Land's conduct created "a significant degree of adverse effect" and that she is unfit to teach.[47] As such, he upheld the district's discharge.

In exceptions to ALJ Ward's decision, Ms. Land challenged the determination that there was reasonable and just cause to discharge her. The Tenure Commission held that Ms. Land's conduct couldn't reasonably constitute professional misconduct because the conduct didn't occur on school grounds or at a school activity and "had nothing to do with appellant's teaching obligation or with students."[48] The Commission reasoned that there was no evidence that children were present or that there was a reasonable expectation that children might be present. The Commission also considered the context of the event, which was a bachelor/bachlorette party held for adults. With regard to the adverse effect that ALJ Ward found as a result of Ms. Land's behavior, the Commission determined that:

> Absent misconduct, consideration of negative publicity surrounding a teacher's behavior would run afoul of the purpose of the Teacher's Tenure Act to protect the rights of competent teachers

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[47] *Id.*

[48] *Land v. L'Anse Creuse Public Schools Board of Education*, TTC 07-54 (Tenure Commission's opinion issued October 9, 2008).

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> to teach. Thus, while we agree that it was unfortunate that students gained access to the photographs in this case, we expressly disavow any suggestion that negative publicity alone, absent a showing of underlying professional misconduct, can provide reasonable and just cause for discipline of a teacher under the Teacher Tenure Act.[49]

While the Tenure Commission didn't articulate a test for determining "professional misconduct", it stated that "[t]he determination of whether a teacher has engaged in professional misconduct is made on a case-by-case basis and demands steadfast attention to the specific facts concerning the conduct of the teacher."[50] In its review of the facts of the *Land* case, the Commission found "that the appellant shouldn't have expected to be disciplined for this off-campus, off-duty conduct that didn't involve students and we don't find that she is guilty of professional misconduct."[51] Ms. Land was reinstated with back pay.

Where Does this Land the Adverse Effects Doctrine?

If the rationale of the Tenure Commission is adopted by the Michigan Court of Appeal it would represent a departure from the adverse effect doctrine crafted by *Beebee* and its progeny. First, the Court of Appeals expressly stated in *Miller* that when a district attempts to discipline a teacher for conduct that took place outside of the school and didn't involve students the district could put forth evidence of the adverse effect that the conduct had on the school, its teachers, parents and students. While the court didn't find that proof of adverse effect was a requirement, it acknowledged the difficulty that a school district would encounter if it couldn't put forth evidence of the adverse effect of the teacher's conduct. By refusing to even consider adverse effect in the *Land* case, the Tenure Commission basically undercut the school district's entire argument and affirmed the opinion of the appellate court that a district couldn't establish just and reasonable cause for disciplining a teacher for conduct that occurs outside of school and that doesn't involve students absent a showing of adverse effect.

In addition, the Tenure Commission created a threshold test for the adverse effect doctrine not articulated in any prior Tenure Commission decision or decision by any Michigan court. The Tenure Commission wouldn't apply the adverse effect test put forth in *Morrison* because it couldn't conclude that Ms. Land's conduct constituted "professional misconduct." This requirement that the teacher's behavior constitute "professional misconduct" wasn't established in *Beebee* or its progeny. As previously stated above, the *Miller* court stated that "a school board may justify a disciplinary action against a teacher by showing that the teacher's *conduct or attitude* has an adverse effect on the students, staff or institution." The court never required a determination of "misconduct"; rather it conceded that a teacher's conduct, or even his/her attitude, may be the basis for discipline with an adequate showing of adverse effect. While the Tenure Commission didn't state a test for its newly formed "professional misconduct" threshold requirement, it suggested that a review of the teacher's subjective thoughts was appropriate to determine whether the teacher should have expected to be disciplined for their off-campus, off-duty conduct that didn't involve students. This subjective analysis was never articulated by the Court of Appeals or Commission in any previous case and it would be difficult, if not impossible, to decipher what Ms. Land's subjective mindset was at the time that the pictures were being taken. If discipline for a teacher's outside of the classroom behavior not involving students hinged on whether the teacher "should have expected to be disciplined," a school district would be hard pressed to discipline any such behavior.

Finally, the Tenure Commission's opinion strongly suggests that school districts are only permitted to discipline a teacher for behavior that occurred outside of the classroom and didn't involve students if that behavior leads to a criminal conviction. The Tenure Commission cited to the *Boyle* case where a teacher was discharged following an assault and battery conviction stemming from nonconsensual sexual touching of an undercover

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[49] *Id.*

[50] *Id.*

[51] *Id.*

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officer in a public restroom.[52] In that case the Commission conceded that the negative publicity and notoriety surrounding the teacher's misconduct may substantially impair their function as a teacher. The Commission differentiated that case from the *Land* case because Boyle's behavior resulted in a conviction, which the Commission opined "established professional misconduct." Requiring a criminal conviction to establish "professional misconduct" would substantially narrow the application of the adverse effect doctrine and limit the school district's ability to discipline teachers for behavior that it believes is inappropriate for a teacher. Moreover, several situations could arise where a teacher's behavior is criminal in nature, but charges aren't pursued by the police department or prosecutor for various reasons. In that situation, the Tenure Commission's decision would essentially prohibit the district from taking employment action against the teacher for their behavior and its negative impact on the district.

L'Anse Creuse School District has appealed the Tenure Commission's decision to the Michigan Court of Appeals, which has granted its leave to appeal and will schedule oral arguments on the case.[53] How the *Land* case is decided by the Michigan courts has a substantial bearing on an employer's ability to discipline an employee for noncriminal, off duty conduct that has direct and adverse effect on the students, other teachers and parents for school districts throughout the state.

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52 *Boyle v. Board of Education of Lapeer County Intermediate School District*, TTC 94-4.

53 COA Case Number 288612.

Michigan Supreme Court Rules that a Mistake About Whether a Tax is Authorized is a Mistake of Law to Which MCL 211.53a Does Not Apply

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In *Briggs v Detroit Public Schools*, __ Mich __ (Docket Nos. 138168, 138179 & 138182, March 30, 2010), the Michigan Supreme Court held that a mistake by Detroit Public Schools (DPS) by which the DPS operating tax was levied for 2002, 2003 and 2004 without voter authorization wasn't a mistake to which the three-year period of limitation provided in MCL 211.53a applied. The decision reversed the Court of Appeals and reinstated the dismissal entered by the Michigan Tax Tribunal.

Prior to the effective date of Proposal A, DPS had been authorized to levy more than 18 mills for school operating purposes. Proposal A limited school operating tax rates to 18 mills, provided that taxes already authorized remain effective up to the limit, until they expired. The taxes were approved before Proposal A expired in 2002, but DPS believed that Proposal A authorized the 18 mill operating tax and therefore didn't seek voter approval before continuing to levy the 18 mill tax for 2002 through 2005. When DPS became aware of the error, it notified bondholders and class action suits were immediately filed by taxpayers seeking refunds of taxes paid in both Circuit Court and the Tax Tribunal. DPS sought voter approval of the 2005 tax, which passed, rendering the 2005 claims moot.

The Circuit Court dismissed the action filed therein because exclusive jurisdiction was in the Tax Tribunal. The Tax Tribunal dismissed the cases filed in the Tribunal because they weren't timely filed. The petitioners in the lead case moved for reconsideration and were granted an opportunity to amend their petition and to pursue discovery before another hearing would be held on a motion to dismiss. Following discovery and the filing of a motion for summary disposition, an answer and a hearing, the Tribunal again dismissed the case. The Tribunal reasoned that the amended Petition hadn't been filed within 30 days and it didn't fall within the exception provided by MCL 211.53a, which allows claims for refunds to be filed within three years if the overpayment is caused by a mutual mistake of fact of clerical error by the assessor and the taxpayer.

Petitioner appealed and the Court of Appeals reversed, ruling that the tax overpayment had been caused by a mutual mistake of fact between the assessor and the taxpayer. The Court of Appeals found that the assessor and the taxpayers both mistakenly believed that the tax had been authorized and that constituted a mistake of fact.

DPS, the city and the county applied for and were granted leave to appeal. DPS raised several arguments. It argued that the mistake that caused the tax overpayment was that of DPS, not any claimed mistake by the city assessors, and that DPS' mistake was a mistake of law, not fact, both because mistakes by which unauthorized taxes are levied have been held to be mistakes of law, and because the premise for levying the tax in this case was a mistaken understanding of what the law required. DPS cited cases such as *Upper Peninsula Generating Co v City of Marquette*, 18 Mich App 516; 171 NW2d 572 (1969), *Carpenter v City of Ann Arbor*, 35 Mich App 608; 192 NW2d 523 (1971) and *Hertzog v Detroit*, 378 Mich 1; 142 NW2d 672 (1966) for the proposition that the levy of unauthorized taxes were mistakes of law. DPS argued that the assessors made no mistake whatsoever because they were required to place on the tax roll the tax rate certified to them by DPS and multiply that by the taxable values, which they did without error. DPS also argued that any claimed misperception by the assessors couldn't have caused the tax overpayment, nor could use of the DPS certification be viewed as an adoption of the DPS error, because whatever the assessors thought, they had an affirmative statutory duty to place on the roll the tax rates certified to them by DPS.

The taxpayers argued that both the assessor and the taxpayers believed the tax was valid and therefore due. The taxpayers contended that the assessors would never have spread the tax on the tax roll nor would the taxpayers have paid the tax had they believed otherwise, and that the mistake was factual. They argued that assessors have a duty to review tax levies or at least the power to refuse to spread such levies. The taxpayers argued that the precedents set forth by DPS were obsolete and should be overruled because they were inconsistent with the spirit of the Court's recent decision *in Ford v Woodhaven,* 475 Mich 425, 716 NW2d 247 (2006), which had held that a mistake by Ford in its personal property statements which the assessor adopted and used in making the assessments were mutual, factual, caused the tax overpayment and supported application of the three-year period of limitation.

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In *Briggs*, the Supreme Court began its analysis by reviewing its recent holding in *Ford*, in which it held that 'mutual mistake of fact' was a term of art to be given its common law meaning and held that a 'mutual mistake of fact' is "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." The Court acknowledged that:

> DPS levied a tax without the requisite voter approval. It erroneously believed that it could levy an 18-mill tax for tax years 2002, 2003 and 2004 when, in fact, authorization for the previously approved tax had expired. This resulted in wrongful assessments that petitioner and other taxpayers paid in full.

The Court concluded:

> However, we conclude that this mistake does not constitute a "mutual mistake of fact" within the meaning of MCL 211.53a.

The Court found that the mistake was that of DPS alone. DPS had levied its tax and certified the rate to the city assessors and the assessors were then required by the General Property Tax Act §24b and the City Charter to spread the tax as certified to them. The Court held that there's "no authority supporting petitioner's argument that assessors are empowered to review or alter certified tax rates. Indeed, an assessor who refuses to spread a certified tax is subject to a mandamus action." (Slip Op. p. 13.) The Court also addressed the Court of Appeals' agency reasoning, concluding that there's "no basis for the Court of Appeals holding that DPS' mistake can be imputed to the assessor because an agency relationship exists between those parties".

The Court also ruled that the mistake wasn't factual. In reaching this conclusion, the Court looked not to deposition testimony, but relied on the case law that had adopted the rule that the levy of a void tax is a mistake of law. (Slip Pp. p. 14 – 16.) Far from holding that those earlier decisions were rendered obsolete by the recent *Ford* decision, the Court discussed and applied the reasoning of *Upper Peninsula Generating Co v City of Marquette*, *Carpenter v City of Ann Arbor*, and *Hertzog v Detroit*. About these cases the court stated: "These cases stand for the proposition that a mistake about the validity of a tax constitutes a mistake of law. We agree with their reasoning and reaffirm that collection of an unauthorized tax constitutes a mistake of law, not a mistake of fact."

This may be important to taxing units which may mistakenly levy a void, unauthorized tax.

The Court's unanimous decision reversed the Court of Appeals and reinstated the decision of the Tax Tribunal.

It appears that both litigants are focusing on the practical result and how it affects them. The owner of Briggs Tax Services reportedly stated that the result was unfair because if government collects an illegal tax it should refund it. DPS' reported reaction was that if it had been ordered to refund the tax, its deficit would have doubled. From the perspective of law and policy, the result maintains a longstanding distinction between the treatment of mistakes of fact and mistakes of law, which the legislature adopted with the enactment of MCL 211.53a. MCL 211.53a requires prompt appeals of mistakes of tax rates. The Supreme Court's decision doesn't preclude taxpayers from appealing errors in tax rates; it simply applies the 30-day limitation period in the Tax Tribunal Act provided for "all other matters." The result is that taxpayers must check the tax rates levied and raise any claims promptly. The 30-day period is short, to allow such mistakes by taxing units in a tax levy to be corrected. The problem in this matter, for example, was discovered in August 2005 and the voters immediately approved the tax at issue for that year. A short period of limitation is also provided because tax levy errors will likely apply to an entire taxing unit; treatment of such errors as mistakes of law avoids large retroactive refunds for all or most of the taxpayers in a taxing unit, which would likely have to be paid by levying a judgment tax on largely the same taxpayers.

There are approximately 120 cases in the Tax Tribunal and the appellate courts that were placed in abeyance pending the final decision in the *Briggs* case. The decision of the Michigan Supreme Court should allow those cases to proceed to resolution.

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MASBMCSA
Michigan Council of School Attorneys

22nd Annual Spring Law Conference

Presented By:

The Michigan Council of School Attorneys

Thursday, May 13, 2010
Lansing Community College, West Campus
9 a.m. – 4 p.m.

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